No. 06-466

IN THE

Supreme Court of the United States

PACIFIC GAS AND ELECTRIC COMPANY

Petitioner,

v.

SAN LUIS OBISPO MOTHERS FOR PEACE, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the National Environmental Policy Act ("NEPA") requires a federal agency to consider, as part of its NEPA review of an agency action, the environmental impact of potential sabotage whenever the possibility of sabotage is anything more than "remote and highly speculative," regardless of whether the agency action lacks a close, "proximate-cause" relationship to the potential sabotage and its impacts.

2. Whether an agency is required to consider the risk of sabotage in its NEPA review even if the agency reasonably concludes that the risk is not sufficiently quantifiable to be meaningful or to assist agency decision making under NEPA.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 3

ARGUMENT 4

I. THIS COURT'S REVIEW IS WARRANTED TO ENSURE THAT NEPA REVIEW REMAINS FOCUSED ON ITS IMPORTANT PURPOSE OF CONFIRMING THAT AGENCIES CONSIDER THE ENVIRONMENTAL EFFECTS OF THEIR DECISIONS AND IS NOT MISUSED TO DELAY OR DERAIL IMPORTANT PROJECTS 4

A. As a Regulatory Accountability Statute, NEPA Ensures that Agencies Consider the Environmental Impacts of Their Actions 4

B. Because NEPA Can Be Misused to Delay or Derail Important Projects, Courts Must Not Expand The Act's Reach Beyond the Scope of Congressional Intent 6

C. Because Of NEPA's Broad Scope, The Ninth Circuit's Decision Will Likely Impose Serious Risks And Delays On A Wide Variety Of Projects And Industries. 8

TABLE OF CONTENTS – continued

Page

II. THE COURT SHOULD GRANT REVIEW TO MAKE CLEAR THAT CRIMINAL ACTS OF THIRD PARTIES ARE NOT WITHIN THE PURVIEW OF NEPA 10

A. The Ninth Circuit has Departed from this Court's Holdings that a Proposed Agency Action Must be the Legally Relevant Cause of an Environmental Effect in Order to Require NEPA Review 11

B. Agencies Should Not be Required to Address the Environmental Effects of the Random Criminal Acts of Third Parties 13

C. The Ninth Circuit's Departure From the Proper Approach Employed by Other Circuits Will Undermine Cooperative Efforts by Businesses and the Government to Safeguard Critical Infrastructure from Terrorist Attack 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

CASES:

Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4th Cir. 1972) 9

Cady v. Morton, 547 F.2d 786 (9th Cir. 1975) 8

Dep't of Transportation v. Public Citizen, 541 U.S. 752 (2004) 5

Fuel Safe Washington v. Fed. Energy Reg. Comm'n, 389 F.3d 1313 (10th Cir. 2004) 9

Glass Packaging Inst., et al. v. Regan, 737 F.2d 1083 (D.C. Cir. 1984) 14

Metropolitan Edison Co. v. People Against Nuclear Energy, et al., 460 U.S. 766 (1983) 11, 12

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-05, 56 N.R.C. 340 (2002) .. 2, 13

Robertson v. Methow Valley Citizens Council, 490 U.S. 343 (1989) 4, 5

Rodriguez v. United States, 480 U.S. 522 (1987) 4

Scientists' Institute for Public Information, Inc. v. AEC, 481 F.2d 1079 (D.C. Cir. 1973) 8

Sierra Club v. Lynn, 502 F.2d 43 (5th Cir. 1974) 9

Suffolk Cty. Sec. of the Interior, 562 F.2d 1368 (2d Cir. 1977) 8

TABLE OF AUTHORITIES — (Cont'd)

Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978) 6

Weinberger v. Catholic Action of Haw., 454 U.S. 139 (1981) 4

Wilderness Soc'y v. Morton, 479 F.2d 842 (D.C. Cir. 1973) .8

STATUTES, RULES, AND REGULATIONS

40 C.F.R. § 1500.1(c) 8

40 C.F.R. § 1502 5

40 C.F.R. § 1502.9 5

40 C.F.R. § 1508.13 5

40 C.F.R. § 1508.4 5

40 C.F.R. § 1508.8 11

40 C.F.R. § 1508.9 5

63 Fed. Reg. 58045 (Oct. 29, 1998) 10

67 Fed. Reg. 19,600 (Apr. 22, 2002) 2

68 Fed. Reg. 48893 (Aug. 15, 2003) 9

Exec. Order No. 11991, 3 CFR 123 (1978) 5

Federal Power Act, 16 U.S.C. § 791a et seq. 9

National Environmental Policy Act of 1969 ..... passim

TABLE OF AUTHORITIES — (Cont'd)

MISCELLANEOUS

Bradley C. Karkkainen, *Whither NEPA?* 12 N.Y.U. Envtl. L.J. 333 (2004) 7

Daniel Ackman, *Highway to Nowhere: NEPA, Environmental Review and the Westway Case*, 21 Colum. L.J. & Soc. Probs. 325 (1988) 7

Denis Binder, *NEPA, NIMBYs and New Technology*, 25 Land and Water Law Review 11 (1990) 7

Edward Abbey, The Monkey Wrench Gang (1975) 7

Frank B. Cross, *The Judiciary and Public Choice*, 50 Hastings L. J. 355 (1999). 6

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Serge Taylor, Making Bureaucracies Think: The Environmental Impact Statement Strategy of Administrative Reform (1984) 4

TABLE OF AUTHORITIES — (Cont'd)

Stark Ackerman, *Observations on the Transformation of the Forest Service: The Effects of the National Environmental Policy Act on U.S. Forest Service Decision Making*, 20 Envtl. L. 703 (1990). 7

U.S. Government Accountability Office, Critical Infrastructure Protection: Progress Coordinating Government and Private Sector Efforts Varies by Sector Characteristics (Oct. 2006) 15

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing a membership of nearly three million businesses and organizations of every size, in every industry sector and geographical region of the country.[1] A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus* briefs in numerous cases addressing issues of vital concern to the Nation's business community.

The National Environmental Policy Act of 1969 ("NEPA") requires assessment of the potential environmental impacts of every major federal agency action, including numerous licensing proceedings and regulatory actions. Representing a business community which controls 85% of the nation's critical infrastructure, the Chamber has a substantial interest in ensuring that NEPA's scope is not erroneously extended to require agency analysis of the possible effects of terrorist attacks, which could not reasonably be attributed to the agency decisions that NEPA is designed to inform.

If the decision below were left undisturbed, members of the Chamber would confront NEPA-related red-tape and endless litigation as they sought federal approval for, *inter alia*, construction projects, subway systems, airports, waste treatment facilities, oil refineries and chemical plants—all of which could be subject to terrorist attacks. These projects are

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[1] Pursuant to Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation and submission. The written consents of the parties to the filing of this brief have been filed with the clerk.

vitally important to our economy and to the stability of our national infrastructure.

STATEMENT

Upon receipt of Petitioner Pacific Gas & Electric Company's ("PG&E") application for a license to store spent nuclear fuel in an independent spent fuel storage installation ("ISFSI"), the Nuclear Regulatory Commission ("NRC") published a notice of opportunity for hearing on the application. 67 Fed. Reg. 19,600 (Apr. 22, 2002). In petitioning to intervene, Respondent San Luis Obispo Mothers for Peace and its coalition (collectively "SLOMFP") requested that the Commission address the environmental consequences of a terrorist attack on the planned storage facility. Pet. App. 69a.

On initial review, the Atomic Safety and Licensing Board ("Board") concluded that SLOMFP's requests represented improper challenges to the NRC's security regulations. Accepting the referral from the Board, the NRC applied an intervening precedent, *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-05, 56 N.R.C. 340, 348-350 (2002), to the instant case. Pet. App. 42a. In *Private Fuel Storage*, the NRC declined to interpret NEPA to require consideration of a possible terrorist attack, for four reasons:

- "The causal relationship between approving the PFS facility and a third party deliberately flying a plane into it is too attenuated to require a NEPA review, particularly where the terrorist threat is entirely independent of the facility." Pet. App. 55a.

- "The horrors of September 11 notwithstanding, it remains true that the likelihood of a terrorist attack being directed at a particular nuclear facility is not quantifiable." *Id.*

- "NEPA does not call for a 'worst-case' inquiry[.]" Pet. App. 58a.
- "The public aspect of NEPA processes conflicts with the need to protect certain sensitive information." Pet. App. 62a.

Rejecting the NRC's reliance on these sensible considerations, Pet. App. 30a, the Ninth Circuit concluded that NEPA required the NRC to assess the potential environmental effects of a terrorist attack on the proposed ISFSI. Relying principally on NRC's own ongoing security review of its regulations and programs, the court concluded that the threat was not "remote and highly speculative for NEPA purposes," Pet. App. 23a [internal quotation marks omitted], and that "the NRC ha[d] not established that the risk of a terrorist attack [was] unquantifiable." Pet App. 26a. With respect to limitations on public participation necessitated by information-security requirements, the court found "no support for the use of security concerns as an excuse from NEPA's requirements." Pet App. 29a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has imposed substantial and unnecessary costs on American business and undermined the ongoing collaborative effort between the federal government and the business community to safeguard critical infrastructure. The Ninth Circuit misread NEPA's laudatory objective of ensuring that agencies consider impacts on the environment to incorporate threat assessments of attacks on nuclear facilities. That decision introduces significant redtape and the prospect of endless litigation to a security process which demands flexibility and alacrity. Other Circuits have opted for a more modest approach which recognizes that NEPA does not require agencies to address the consequences of random, criminal behavior by independent actors. Immediate review is warranted to resolve this split in the courts below.

ARGUMENT

I. THIS COURT'S REVIEW IS WARRANTED TO ENSURE THAT NEPA REVIEW REMAINS FOCUSED ON ITS IMPORTANT PURPOSE OF CONFIRMING THAT AGENCIES CONSIDER THE ENVIRONMENTAL EFFECTS OF THEIR DECISIONS AND IS NOT MISUSED TO DELAY OR DERAIL IMPORTANT PROJECTS

There is no question that NEPA serves important purposes by requiring federal agencies to take a hard look at likely environmental effects when deciding whether or how to take particular actions. Every statute, however, has limitations as well as purposes, and both must be observed in order to implement Congress's design. See *Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987) (per curiam). Here, the Ninth Circuit has pushed NEPA well beyond proper limits, in a ruling that invites just the sort of procedural abuse that has unfortunately come to characterize much NEPA litigation.

A. As a Regulatory Accountability Statute, NEPA Ensures that Agencies Consider the Environmental Impacts of Their Actions

NEPA operates by "inject[ing] environmental considerations into [a] federal agency's decisionmaking process." *Weinberger v. Catholic Action of Haw.*, 454 U.S. 139, 143 (1981); see *Robertson v. Methow Valley Citizens Council*, 490 U.S. 343, 349 (1989). In that respect it has been a model for other regulatory accountability statutes. See Serge Taylor, Making Bureaucracies Think: The Environmental Impact Statement Strategy of Administrative Reform 295 (1984) (describing use of impact statements to analyze inflation, regulatory impact, competition, arms control, and effects on small business).

The present Council on Environmental Quality regulations addressing NEPA review were issued in response to an

Executive Order directing the Council to "make the environmental impact statement process more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on *real environmental issues* and alternatives." Exec. Order No. 11991, 3 CFR 123 (1978) (emphasis added). Even with that mandate, the CEQ regulations contemplate an often lengthy process. First, the relevant agency must determine whether there is any Categorical Exclusion that removes the proposed action from the purview of NEPA. 40 C.F.R. § 1508.4. If not, the agency must prepare an environmental assessment ("EA"), which explores whether the proposed action is likely to result in a significant impact on the environment. 40 C.F.R. § 1508.9. If the agency determines that no such impact will occur, it issues a finding of no significant impact ("FONSI"). 40 C.F.R. § 1508.13. Otherwise, it must prepare an environmental impact statement ("EIS"). 40 C.F.R. § 1502. To allow for public participation, the regulations require a draft, a comment period, and a final EIS that addresses comments received. 40 C.F.R. § 1502.9.

By requiring agencies to prepare an environmental assessment or impact statement, the Act serves two central purposes:

> First, '[i]t ensures that the agency, in reaching the decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.' Second, it 'guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.'

Dep't of Transportation v. Public Citizen, 541 U.S. 752, 768 (2004) (quoting *Robertson*, 490 U.S. at 349 (1989)).

However, nothing in the statute (or its legislative history) evidences any congressional intent to require agencies to consider, in making their own decisions, the possible environmental impacts of later criminal actions of third parties. Nor do those materials evince any intention that NEPA review serve as a vehicle for addressing issues of national security or threat assessment.

B. Because NEPA Can Be Misused to Delay or Derail Important Projects, Courts Must Not Expand The Act's Reach Beyond the Scope of Congressional Intent

NEPA's requirements are essentially procedural: An agency must take a "hard look" at potentially significant environmental effects of its proposed actions, but the Act does not purport to control the agency's ultimate choices. See, e.g., *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978). That procedural mandate has served an important role in correcting a situation in which agencies did not take sufficient account of environmental concerns.

Over time, however, both NEPA's procedural requirements and, in particular, litigation challenging the adequacy of an agency's NEPA compliance have also become "notorious for special interest abuse." Frank B. Cross, *The Judiciary and Public Choice*, 50 Hastings L. J. 355, 375 (1999). An expansive judicial view of NEPA's requirements, which first shapes action at the administrative level and then plays out in follow-on litigation, can introduce significant costs and delay in obtaining agency action—costs and delay that are too often the only real ends of those who use NEPA to impose them.

One commentator describes the phenomenon as follows:

> Delay buys time, which opponents can use to build popular and political opposition to the project. New information may develop, partially through the dis-

> closures of the NEPA statement. Inflationary pressures, and other costs, could economically doom the project during the delay. NEPA thereby became an important means to the end: stopping the project.

Denis Binder, *NEPA, NIMBYs and New Technology*, 25 Land and Water Law Review 11, 17 (1990). See also, e.g., James Dao, *Environmental Groups to File Suit over Missile Defense*, N.Y. Times, Aug. 28, 2001, at A10 (reporting plaintiff's statement that "the hope is that [the NEPA-induced] delay will lead to cancellation.... That's what we always hope for in these suits."); Daniel Ackman, *Highway to Nowhere: NEPA, Environmental Review and the Westway Case*, 21 Colum. L.J. & Soc. Probs. 325 (1988). In other words, NEPA can easily become a tool of those interested in scuttling a project for any reason.

In this regard, "[t]he monkey wrencher ... places a high value on NEPA because it affords extraordinary opportunities to throw up procedural roadblocks that may delay or kill projects the monkey wrencher opposes." Bradley C. Karkkainen, *Whither NEPA?* 12 N.Y.U. Envtl. L.J. 333, 339 (2004) (citing Edward Abbey, The Monkey Wrench Gang (1975)). This misuse of NEPA imposes real costs, not only on affected private parties but on the very agency decision-making processes that NEPA was meant to *enhance*. "[W]here appeals are brought against entire programs, or simply to delay decisions, they can cause great time and resource drains on the agency and its decision making[.]" Stark Ackerman, *Observations on the Transformation of the Forest Service: The Effects of the National Environmental Policy Act on U.S. Forest Service Decision Making*, 20 Envtl. L. 703, 730 (1990).

None of this is an argument for refusing to enforce NEPA in accordance with its terms. But the reality of NEPA abuse is a powerful reason for this Court to ensure that judicial decisions do not extend NEPA's reach beyond what Congress

could ever have contemplated or intended. That is what the Ninth Circuit has done here.

C. Because Of NEPA's Broad Scope, The Ninth Circuit's Decision Will Likely Impose Serious Risks And Delays On A Wide Variety Of Projects And Industries.

NEPA's broad scope means that the potential impact of the Ninth Circuit's decision extends well beyond the nuclear industry. NEPA applies by its terms to "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4321; 40 C.F.R. § 1500.1(c). "Federal action" has been defined expansively, to include circumstances where an agency acts on its own behalf, or approves a lease of land on which the action will occur, or grants a permit or license that authorizes the action, or uses federal monies to fund the action. See, e.g., *Scientists' Institute for Public Information, Inc. v. AEC*, 481 F.2d 1079, 1088-89 (D.C. Cir. 1973). Thus, the scope of NEPA's application—and therefore the impact of the Ninth Circuit's decision—is very broad: any industry whose construction projects are routinely subject to federal licensing and permitting, or which are federally funded, is within reach of this decision. Here are but a few of countless possible examples:

- Oil, coal, and natural gas companies are affected by NEPA when, for example, their mining and exploration efforts occur on federal land or on federal offshore waters. See, e.g., *Cady v. Morton*, 547 F.2d 786 (9th Cir. 1975) (coal); *Suffolk Cty. Sec. of the Interior*, 562 F.2d 1368 (2d Cir. 1977) (oil and gas).

- Oil and other pipeline projects are brought within NEPA to the extent that they require any federal permits or rights-of-way across federal land. See, e.g., *Wilderness Soc'y v. Morton*, 479 F.2d 842 (D.C. Cir. 1973) (describing the environmental

impact statements filed in connection with the Trans-Alaska Pipeline).

- Natural gas pipeline projects are subject to NEPA review by 15 U.S.C. § 717f(c)(1)(A), which prohibits construction of most pipelines without first obtaining a "certificate of public convenience and necessity" from the Federal Energy Regulatory Commission, and which therefore renders all such construction a "federal action" for NEPA puposes. See, e.g., *Fuel Safe Washington v. Fed. Energy Reg. Comm'n*, 389 F.3d 1313, 1317-18 (10th Cir. 2004).

- Oil, gas, and coal power projects are subject to NEPA when funded in part by federal programs such as (for example) the Clean Coal Power Initiative. See, e.g., *Dep't of Energy, Notice of Intent to Prepare an Environmental Impact Statement for the Colorado Springs Next-Generation CFB Coal Generating Unit, Fountain*, CO, 68 Fed. Reg. 48893 (Aug. 15, 2003).

- Hydroelectric power projects and transmission lines are subject to NEPA by virtue of the licensing requirements of the Federal Power Act, 16 U.S.C. § 791a et seq.

- Construction and infrastructure development companies are subject to the act whenever their projects involve the interstate highway system, including road, bridge, and tunnel projects. See, e.g., *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323 (4th Cir. 1972).

- Real estate developers and builders are affected by the act through their involvement in projects involving HUD or other federal financing, or when they construct federal buildings. See, e.g., *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974).

To be sure, there are some exceptions to the NEPA regime. For example, agency actions pursuant to the Clean Air Act, are by statute deemed not to constitute "major federal actions" for NEPA purposes, 15 U.S.C. § 793(c)(1), although the Environmental Protection Agency maintains a policy of conducting "voluntary" NEPA reviews in some circumstances. See Notice of Policy and Procedures for Voluntary Preparation of Nation Environmental Policy Act (NEPA) Documents, 63 Fed. Reg. 58045 (Oct. 29, 1998).)

Even considering such exceptions, however, the broad scope of federal funding, licensing, and permitting activity brings within the NEPA framework an enormous number of projects and industries that are potentially affected by the Ninth Circuit's decision.

II. THE COURT SHOULD GRANT REVIEW TO MAKE CLEAR THAT CRIMINAL ACTS OF THIRD PARTIES ARE NOT WITHIN THE PURVIEW OF NEPA

NEPA is intended to require agencies to think about the foreseeable environmental consequences of *their* actions. It was never intended to require them to consider the remotely conceivable consequences of possible later actions by criminal third parties—or to turn agency *environmental* assessments into terrorist *threat* assessments or assessments of the nature or adequacy of national security arrangements. This Court should grant review to rein in the Ninth Circuit's departure from the restrained approach to NEPA's scope adopted by this Court and other circuits and to avoid undermining the substantial existing collaboration between the business community and the government that is designed to protect the nation's critical infrastructure through more appropriate means.

A. The Ninth Circuit has Departed from this Court's Holdings that a Proposed Agency Action Must be the Legally Relevant Cause of an Environmental Effect in Order to Require NEPA Review

The CEQ's regulations articulate an important distinction that has been adopted and clarified in this Court's decisions. Those regulations define the "effects" an agency must consider under NEPA as follows:

> 'Effects' include:
>
> (a) Direct effects, which are caused by the action and occur at the same time and place.
>
> (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

40 C.F.R. § 1508.8. Whether an effect is direct or indirect, an agency must address it only if it would be "caused by" the agency's proposed action.

In *Metropolitan Edison Co. v. People Against Nuclear Energy, et al.*, 460 U.S. 766 (1983), and *Public Citizen,* this Court emphasized that this causation test imposes real limits on NEPA's scope. In *Metropolitan Edison*, plaintiffs residing near a nuclear facility contended that NEPA required consideration of their psychological harm caused by their perception of the risk of a nuclear accident. Concerned that recognizing such a claim "might [cause NEPA to] embrace virtually any consequence of a governmental action[,]" 460 U.S. at 772, this Court held:

> Our understanding of the congressional concerns that led to the enactment of NEPA suggests that the terms "environmental effect" and "environmental impact" in § 102 be read to include a requirement of *a reasonably close causal relationship* between a change in the physical environment and the effect at issue. This requirement is like the familiar doctrine of proximate cause from tort law.

460 U.S. at 774 (emphasis added).

Two decades later, the Court returned to the principles of legal causation in *Public Citizen*. In that case, the NEPA process was invoked to require the Department of Transportation to evaluate whether its action to issue licenses for cross-border trucking would lead to increased traffic from Mexican truckers even though the decision to permit such cross-border traffic had been made by the President in a prior executive order enforcing commitments made pursuant to the North American Free Trade Agreement. Reaffirming the approach outlined in *Metropolitan Edison*, this Court indicated that

> courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor *responsible for an effect* and those that do not.

541 U.S. at 767 (emphasis added) (quoting *Metropolitan Edison*, 460 U.S. at 774 n.7). The Court then confirmed that, "where an agency has no ability to prevent a certain effect due to its limited statutory authority[,]" it cannot be "considered a legally relevant 'cause' of the effect." 541 U.S. at 770.

In light of *Metropolitan Edison* and *Public Citizen*, this Court should grant review to correct the Ninth Circuit's erroneous holding that a federal agency's action in licensing a facility, or approving some other public or private project,

would be the "legally relevant cause" of environmental effects resulting from some later terrorist attack on the facility or project.

B. Agencies Should Not be Required to Address the Environmental Effects of the Random Criminal Acts of Third Parties

Requiring an agency to make current decisions as though it would be responsible for such remotely possible effects, moreover, will not further NEPA's purpose of requiring consideration of the reasonably foreseeable environmental effects of *the agency's* actions.

This point was made persuasively in the Nuclear Regulatory Commission's *Private Fuel Storage* decision—the decision whose reasoning was rejected by the Ninth Circuit. There, the NRC explained why it accounted for natural disasters but declined to do so for the hypothetical terrorist attack:

> The Commission evaluates the impacts of accidents precipitated by natural events such as earthquakes, hurricanes, and other severe storms. Unlike acts of terrorism, such events are closely linked to the natural environment of the area within which a facility will be located and are reasonably predictable by examining weather patterns and geological data for that region. We do not know of similar principles that would permit reasonable prediction of an act of terrorism against a particular facility. Terrorism is a global issue, involving stochastic criminal behavior, independent of the planned facility.

Pet. App. 49a-50a n.18.

That reasonable approach is consistent with this Court's decisions. Licensing of a particular nuclear facility will not increase the general incidence of terrorism, which finds its source in ideological struggles far afield from Diablo Canyon. Like the Department of Transportation in *Public Citi-*

zen, which did not have authority to prevent increased border traffic, the NRC does not control, and cannot influence, the terrorism variable. Moreover, addressing terrorist threats, or appropriate countervailing security measures, as part of an agency's NEPA process would require that process to stray well outside the proper bounds of NEPA analysis and into areas covered by other processes, other statutes, or other agencies. That approach, embraced by the Ninth Circuit, distorts NEPA past all recognition. As the D.C. Circuit put it in *Glass Packaging Inst., et al. v. Regan*, it is most unlikely that "Congress fashioned NEPA as an administrative incarnation of the policeman's squad car, roving the streets in search of sporadic criminal activity which may occasionally occur in the aftermath of an agency action, there to arrest the criminal in the name of 'environmental protection.'" 737 F.2d 1083, 1092 (D.C. Cir. 1984)

C. The Ninth Circuit's Departure From the Proper Approach Employed by Other Circuits Will Undermine Cooperative Efforts by Businesses and the Government to Safeguard Critical Infrastructure from Terrorist Attack

The petition demonstrates how the Ninth Circuit's decision in this case conflicts with the decisions of other circuits. Pet. 9-18, 21-24. Those courts have deferred to reasonable agency decisions that give NEPA full effect, but within proper bounds. That more modest approach allows agencies to proceed with a wide range of decisions affecting public or private projects that *could* be subject to terrorist attack, without becoming entangled in administrative consideration of extraneous and speculative questions, and without having those same questions then made the subject of burdensome NEPA litigation. This Court should grant review to address the conflict in the decisions and restore agencies' ability to act without undue delay or expense on projects of all types throughout the Ninth Circuit.

This Court's review is especially important in light of the many cooperative efforts by government and business since September 11, 2001, to minimize the risk of, and potential harm from, further terrorist attacks. See, e.g., George W. Bush, The National Strategy for the Physical Protection of Critical Infrastructures and Key Assets (Feb. 2003) at http://www.whitehouse.gov/pcipb/physical_strategy.pdf; Homeland Security Advisory Council, Report of the Critical Infrastructure Task Force (Jan. 2006) at http://www.dhs.gov/xlibrary/assets/HSAC_CITF_Report_v2.pdf. With private enterprise controlling roughly 85% of the nation's critical infrastructure, see U.S. Government Accountability Office, Critical Infrastructure Protection: Progress Coordinating Government and Private Sector Efforts Varies by Sector Characteristics (Oct. 2006), this cooperation is essential. See Jeffrey E. Garten, *Homeland Security Could Really Shake Up Business*, Business Week, Sept. 2, 2002, at 24 (explaining that current "challenge ... require[s] a level of public-private cooperation not seen for decades"). By improperly introducing additional NEPA-related costs and delay into the process of making agency decisions relating to any activity or project potentially subject to terrorist attack, the Ninth Circuit's decision will interfere with that collaborative effort throughout the court's jurisdiction—and perhaps in other Circuits, where the decision will be cited as new and persuasive authority. As explained above, moreover, that decision will likely affect an enormous number of building and other projects and many different industries.

The Chamber fully supports proper enforcement of NEPA's requirement that federal agencies consider the reasonably foreseeable environmental impacts of *agency* actions. The Ninth Circuit's decision however, strays well beyond the proper bounds of NEPA, requiring consideration of remotely possible effects of later criminal actions by third parties. That requirement will do nothing to advance NEPA's real purposes, but it will add delay, expense, and

litigation to agency decision-making that is critical to effective public-private cooperation not only in the nuclear power field but in many other areas in which the Chamber's members operate. This Court should grant review and reverse.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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